

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:)	Chapter 7 Case
)	Number <u>94-10954</u>
RICHARD DEAN MOORE)	
)	
Debtor)	
_____)	
)	
RICHARD DEAN MOORE)	
)	
Movant)	
)	
vs.)	FILED
)	at 5 O'clock & 17 P.M.
FIRST FRANKLIN FINANCIAL)	Date: 1-12-95
)	
Respondent)	

ORDER

Before me is the debtor's motion to avoid the lien of First Franklin Financial ("First Franklin"), filed September 1, 1994 and served on First Franklin at Post Office Box 1409, Thomson, Georgia 30824. On September 7, 1994 this court issued a notice setting September 27, 1994 as the deadline for objections to the motion and stating that hearing would be held on the motion October 6, 1994 only if objection was filed. Simultaneous with this notice the court issued an order requiring service by debtor's attorney of the notice and motion on [inter alia] First Franklin. A Certificate of Service was filed September 12, 1994 showing service of the

notice on First Franklin on September 9, 1994. There is no dispute that First Franklin was served with the motion and court notice. No timely response was filed by First Franklin. The attorney for First Franklin, Scott Klosinski, appeared at the time set for hearing¹, objected to the motion and requested that the default be set aside on the basis that he had not been served with the motion as attorney of record for First Franklin.

Neither the motion nor the notice fixing the deadline for objections to the motion were served on Mr. Klosinski, who claims to be the "attorney of record" for First Franklin. Mr. Klosinski argues that his appearance at the § 341 meeting of creditors on First Franklin's behalf is sufficient to establish him as its attorney of record and that notices sent to First Franklin should also be sent to him based on this appearance. The "appearance sign in sheet" from the § 341 meeting was filed August 29, 1994, and shows Mr. Klosinski as appearing on behalf of both Chrysler Credit and First Franklin. Mr. Klosinski listed his phone number but not his address on the sign-in sheet. I find this appearance insufficient to notify the court that future notices and mailings to First Franklin should have been addressed to Mr. Klosinski as the

¹Mr. Klosinski explained his appearance at the time set for hearing notwithstanding his lack of notice of the motion by stating that he happened to be present on another matter and that this matter was originally on the calendar, but removed by the clerk because no timely response had been filed. He requested that the case be called, which it was, and asked that the default be vacated.

"attorney of record."

The motion to avoid the lien of First Franklin alleges that the lien impairs exempt property, hence the motion falls under Federal Rule of Bankruptcy Procedure ("FRBP") 4003(d), governing avoidance by the debtor of transfers of exempt property: "[a] proceeding by the debtor to avoid a lien or other transfer of property exempt under § 522(f) of the Code shall be by motion in accordance with Rule 9014." FRBP 9014² incorporates FRBP 7004,

²FRBP 9014 provides:

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providing for service in subsection (b)³, which section does not require service on a party's attorney.

In fact, nothing in the Bankruptcy Code or Rules requires notice of a motion initiating a contested matter to be served on an attorney of record, much less an attorney whose appearance falls short, as Mr. Klosinski's does, of notifying the court that he is the attorney of record. Mr. Klosinski's position that his appearance at the § 341 meeting on First Franklin's behalf

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³FRBP 7004 provides in relevant part:

(b) . . . service may be made within the United States by first class mail postage prepaid as follows: . . .

(1) Upon an individual other than an infant or incompetent, by mailing a copy of the summons and complaint to the individual's dwelling house or usual place of abode or to the place where the individual regularly conducts a business or profession.

. . .
(3) Upon a domestic or foreign corporation . . . by mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

establishes him as attorney of record ignores the requirement of filing the notice of appearance required under FRBP 9010(b):

An attorney appearing for a party in a case under the Code shall file a notice of appearance with the attorney's name, office address and telephone number, unless the attorney's appearance is otherwise noted in the record.

Mr. Klosinski insists that his appearance, noted on the "appearance sign in sheet" for the § 341 meeting, qualifies as an appearance "otherwise noted in the record" under FRBP 9010(b), but the § 341 meeting is not a hearing. An appearance at the § 341 meeting constitutes notice to the trustee and the debtor and debtor's attorney, but not this court, that the creditor is represented at the meeting of creditors by the attorney making the appearance. I find that Mr. Klosinski's appearance at the § 341 meeting was insufficient to alert this court to his representation of First Franklin as FRBP 9010(b) requires. This appearance is also insufficient to satisfy notice to the court that notices to be sent under FRBP 2002⁴ should be directed to Mr. Klosinski as attorney for

⁴FRBP 2002(g) provides,

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First Franklin. See In re Friel, 162 B.R. 645 (Bankr. W.D. N.Y. 1994) (attorney's appearance on creditor's behalf at § 341 meeting is only notice to the trustee and not to the court, and does not satisfy the directional requirements of FRBP 2002(g)). However, neither FRBP 9010 nor 2002 governs or applies to a motion to avoid lien.

The motion to avoid lien is governed by FRBP 4003(d). Because no notice of the motion to avoid lien is or should be served by the court, whether notice has been given to the court under either FRBP 9010(b) or 2002(g) is inapposite. The simple fact is that the Bankruptcy Rules require that the initial service of a

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motion and notice of a motion be made only upon the respondent. There is nothing in the Rules that could be construed to require service by the debtor on both the respondent and an attorney representing the respondent. In this case debtor's counsel can be charged only with the knowledge that Mr. Klosinski appeared at the §341 meeting on behalf of First Franklin. From that appearance alone it would have been wrong for debtor's counsel to assume that Mr. Klosinski was then authorized to receive service of the motion for First Franklin. Service of the motion initiating a contested matter is required under FRBP 7004 on either the respondent or an attorney acting as agent authorized for service for the respondent. Requiring such service eliminates any potential contest over whether the attorney making such appearance was authorized to receive any subsequent service.

In this case First Franklin was properly served and failed to act. However, while the failure to respond led to a "default," such a "default" is not a final judgment and may be set aside or opened and a hearing on the merits held. The September 7, 1994 notice of the motion to avoid lien established September 27, 1994 as the deadline for filing objection to the motion with any such objection to be heard October 6, 1994. Pursuant to the notice, hearing on the motion would be held only if objection was filed, and "[i]f no timely objection is filed to the motion, an order shall be entered allowing the relief demanded in the motion and the hearing removed from the court's calendar." No objections being filed, the

case was removed from the October 6, 1994 calendar with the expectation of entry of the relief prayed for. See generally FRBP 7055⁵ and 9014, *supra*.

FRCP 55(c) permits relief from a default judgment or an entry of default:

For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

The Rule permits a more relaxed "good cause" standard for relief from an entry of default than for relief from a default judgment, permitted under Rule 60(b) relief from judgment and made applicable in bankruptcy cases under FRBP 9024. Equal Employment Opportunity Commission v. Mike Smith Pontiac GMC, Inc., 896 F.2d 524, 528 (11th Cir. 1990). Accordingly, the standard utilized in granting relief from the default of the respondent's failure to timely file response is also the more relaxed "good cause" standard.

Relief from an entry of default or default judgment is committed to the sound discretion of the court. See, e.g., Robinson v. United States, 734 F.2d 735 (11th Cir. 1984). Similarly, relief

⁵FRBP 7055 makes FRCP 55 applicable to bankruptcy practice and provides in subsection (a):

When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.

from the default under this notice of motion should also be committed to the sound discretion of the court. Additionally, it is generally held that doubtful cases are to be resolved in favor of the party moving to set aside the default so that cases may be decided on their merits. United States v. \$55,518.05 in U.S. Currency, 728 F.2d 192, 195 (3d Cir. 1984). I find that because no prejudice to the plaintiff will result from permitting relief from the default, allowing First Franklin to file written objection to the motion to avoid lien, contest same at hearing and thereby permit resolution of this matter on the merits, First Franklin should be permitted an opportunity to object.

It is therefore ORDERED that Mr. Klosinski's request on behalf of First Franklin to vacate default and allow objection to the motion to avoid lien is SUSTAINED;

further ORDERED that proper service having been perfected the respondent is allowed 20 days from the date of this order to file and serve upon debtor's attorney a written response to the motion to avoid lien. In the event that a timely response is filed hearing will be held February 2, 1995 at 9:00 a.m., United States Bankruptcy Court, 827 Telfair Street, Suite 150, Augusta, Georgia.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 12th day of January, 1995.